

Exhibit 2



THE DURRANT LAW FIRM

Strategic Advocacy. Clear Thinking.

June 16, 2023

Via Email

Bridgette C. Gershoni, Esq.
Michael Gershoni, Esq.
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Re: *NIKE v. BYKIY, et al.* – 1:23-cv-02431-VM (S.D.N.Y.)

Dear Bridgette and Michael:

As you know, the above-referenced Firms represent By Kiy, LLC (“By Kiy”), David Weeks, and Nickwon Arvinger. This letter follows our helpful discussions with you on May 16, 2023 and June 12, 2023, our May 9, 2023 letter, and your June 8, 2023 and May 18, 2023 letters. We write to respond to certain issues that appear to remain outstanding. If we have missed anything, please let us know. We are happy to discuss any matters further with you.

I. Nike’s Initial Disclosures

During our May 16, 2023 discussion, Nike agreed to clarify its Rule 26(A)(a)(iii) disclosure regarding computation of damages. On June 8, 2023 Nike supplemented its initial disclosures. From our discussion on June 12, 2023 and your amended disclosures, By Kiy understands that Nike will be seeking recovery based on unjust enrichment (i.e., the alleged profits By Kiy generated from selling allegedly infringing products plus attorneys’ fees and costs). In other words, we understand that Nike will not seek recovery based on alleged damages caused to Nike by the alleged infringement, such as alleged lost profits to Nike.

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Please let us know promptly if this is incorrect. If Nike were seeking recovery based on harm to Nike, we would need a further explanation of the method by which such harm would be calculated.

II. General Objections to Requests for Production

Both sides have agreed that they do not currently intend to withhold documents on the basis of General Objections, other than attorney-client privileged or attorney work product documents.

III. Privilege Log

By Kiy believes that both sides should create logs of attorney-client privileged or attorney work product documents withheld from production. We would suggest that the parties not log privileged documents to/from current counsel for Nike or By Kiy. We hope that is agreeable and will substantially reduce the burden of creating a privilege log, particularly for Nike. If you have any other reasonable suggestions for reducing the burden of creating a privilege log, please let us know.

IV. By Kiy's Request for Production 10, Other Violations of Trade Dress

By Kiy continues to believe the date limitation in Nike's response is inappropriate. By Kiy is entitled to know the extent of claimed violation of the trade dress over time, particularly as Nike is claiming rights that arise over time. By Kiy has clarified that its request seeks documents or information on shoes that Nike created that Nike believes look similar to the Jordan 1 silhouette (including without limitation the Nike Air Ship, Nike Air Jordan KO, etc., in high or low-top versions).

We believe substantially similar shoes have been ubiquitous in the market before and after Nike's first sale of a Jordan-1. You have stated that this request could be too burdensome for Nike and that you are not aware of Nike having a centralized system for this information but that it will look into it further. We have yet to hear further information on this. Even in the absence of a centralized system, Nike will need to provide reasonable discovery sufficient to show the number and type of other infringing products. We should discuss this further as soon as possible and hopefully find a practical and achievable way forward.

V. By Kiy's Request for Production 12, Kelly Hibler Declarations

Our understanding was that Nike would search for these documents and determine if it could produce them, not that By Kiy would have to manually search for such documents

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on the USPTO website. We are not aware of a way to efficiently conduct such a search on the USPTO website; if you are aware of a way to do that please let us know. As the documents are within Nike's possession, custody, and control and more readily accessible to Nike than By Kiy, we respectfully request that Nike produce them.

VI. By Kiy's Request for Production 13, Documents Regarding Nike's Trademark Claims

Our understanding was that Nike would search for these documents and produce those "sufficient" to show or refute that:

- NIKE has a "rigorous design and manufacturing process" (or materially similar language);
- NIKE's processes are "neither the shortest, nor the cheapest way to make shoes" (or materially similar language);
- NIKE's processes are "critical to meet the consumer's expectations for quality that consumers associate with NIKE" (or materially similar language);
- NIKE trade dress is "distinctive" (or materially similar language); and/or
- NIKE trade dress is "non-functional" (or materially similar language).

We believed this Request was modified by the discussion and not that By Kiy would have to issue a new request for production. Please confirm that Nike will conduct the search of the request as modified and not require By Kiy to issue an entirely new request.

VII. Nike's Request for Production No. 2 – Physical Samples

The parties have discussed the scope of this request, without – as yet – reaching agreement. By Kiy is considering producing representative physical samples of each silhouette of the sneakers it has sold in the United States. We understand that Nike is considering agreeing to produce a physical sample of the Nike Air Jordan 1 silhouette and shoes that Nike created that look similar to the Jordan 1 silhouette (including without limitation the Nike Air Ship, Nike Air Jordan KO...etc.). The parties should discuss these requests further– there may be a mutually agreeable solution.

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VIII. Nike's Requests for Production 3-6, 10, 12-16, 18, 20, The '305 Registration Issue

The Parties have agreed to mutually amend their respective pleadings to remove mentions of the '305 Registration, which is not at issue in this case. During our June 12, 2023 call, the parties agreed to exchange draft pleadings and submit a joint letter motion to the Court requesting leave to amend the pleadings.

IX. Nike's Request for Production No 10 (Forecasts, estimates, etc.)

The parties have discussed the relevance and scope of this Request. By Kiy agreed to search for and produce responsive documents, if there are any, that concern forecasts or estimates of future sales of the allegedly infringing sneakers.

X. Nike's Request for Production No 15 (Gross revenue, gross profits and net profits)

The parties have discussed the relevance and scope of this Request. By Kiy agreed to search for and produce documents responsive documents that concern revenues and costs, i.e., the inputs for the profit calculation under 15 U.S.C. § 1117a. By Kiy contends that the actual calculation of profits is a matter of expert opinion.

XI. Nike's Request for Production No. 18 (Financial statements)

Nike has provided no authority supporting its request for documents regarding By Kiy's finances. The scope of appropriate financial discovery in this should be delimited by the factors required by 15 U.S.C. § 1117a. Beyond that, By Kiy does not believe trademark plaintiffs are entitled to conduct a sweeping inquiry into the finances of their opponents.

XII. Nike's Request for Production No. 22 (Customer complaints)

The parties agreed to limit the scope of this Request such that By Kiy will provide a representative examples of customer complaints regarding By Kiy Sneakers that were sent to By Kiy via email or non-public direct messages (and not a search of social media and the like). By Kiy made clear that this request opens the door to a similar request to Nike, which has put the quality of its goods at issue. We expect a similar agreement to produce from Nike.

XIII. RFP No 30 (By Kiy's ability to satisfy a monetary judgment)

By Kiy contends that this is not properly discoverable and that Nike has provided no authority supporting its Request for Production.

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XIV. Nike's Interrogatories

By Kiy stands by its prior objections to the Interrogatories and the points in its May 9, 2023 letter. The rule seems clear on its face that Nike's interrogatories are improper. We invite Nike to provide any law that supports its view that the interrogatories are proper.

XV. By Kiy's Documents Production

While both sides are apparently trying to produce documents in a timely fashion, neither side has yet produced any emails. Nike has produced some documents, but not apparently those documents that will be core to the dispute or By Kiy's requests. By Kiy's progress has been impeded by Zak Kurtz's illness / hospitalization and some technical issues, which appear to have been resolved. Zak plans to work this weekend on the review of the documents for production. Please let us know when we can expect to receive emails and other documents from Nike.

We do not view the proposed ESI stipulation as appropriate; the law provides sufficient guidance regarding the parties' respective obligations. We expect Nike to find a way to conduct a reasonable search and produce all discoverable information. The terms of the stipulation suggest in several ways an approach to discovery that seems at odds with the law.

Sincerely,

Zakari A. Kurtz, Esquire
Sneaker Law Firm, PLLC

John Durrant, Esq.
THE DURRANT LAW FIRM, APC